NO. 83-5389

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

TERRY MICHAEL MINCEY,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

PART ONE

STATEMENT OF THE CASE

The Petitioner, Terry Michael Mincey, was convicted of murder, armed robbery and aggravated battery on August 26, 1982 upon Indictment No. 23067 in the Superior Court of Bibb County, Georgia. On August 26, 1982, Petitioner was sentenced to death for the murder conviction, and sentenced to consecutive sentences of life imprisonment for the armed robbery conviction and twenty years imprisonment for the aggravated battery conviction.

Petitioner's convictions and sentences were affirmed by the Supreme Court of Georgia at Mincey v. State, 251 Ga. 255, ___ S.E.2d ___ (1983).

Petitioner now seeks a writ of certiorari from the affirmance of his conviction and sentences by the Supreme Court of Georgia.

Further facts may be developed herein as necessary for a more thorough illumination of the issues presented to this Court for resolution.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

A. THIS COURT SHOULD NOT GRANT THE REQUESTED WRIT BECAUSE THE GEORGIA SUPREME COURT, BASED SOLELY ON A STATE PROCEDURAL GROUND, REFUSED TO CONSIDER PETITIONER'S CLAIM OF PROSECUTORIAL MISCONDUCT, I.E., PETITIONER HAD FAILED TO RAISE A TIMELY OBJECTION TO THE PROSECUTOR'S REMARKS AT TRIAL.

On this application for a writ of certiorari, Petitioner contends that the writ should issue because remarks made by the prosecutor at Petitioner's trial allegedly violated Petitioner's Fifth, Eighth, and Fourteenth Amendment rights by improperly commenting upon the Petitioner's failure to testify at trial. Respondent submits that the Supreme Court of Georgia refused to consider this claim, as raised by Petitioner on his direct appeal, based solely on state procedural grounds, i.e., Petitioner had failed to make a timely objection to the prosecutor's remarks at trial.

During the Petitioner's trial the prosecutor attempted to explain why the Petitioner's codefendants had agreed to testify against the Petitioner. The prosecutor stated:

> We wouldn't pretend to you--we would be foolish if we told you that these men (the codefendants) care about truth and justice and come in here and that's their concern. We didn't pick them out. Mincey made them eyewitnesses when he got in the car with them. They are the kind of people he runs around with. We were stuck with them; we had to put them up because they were the witnesses.
>
> But is there anything sinister in that arrangement? Have we done anything wrong?

Is it wrong to encourage people who see a murder to come into court and tell the truth? Now, Mr. Daniel (Petitioner's trial attorney) has brought out what the sentences are. Mr. Jones (a codefendant) has been sentenced to life. That's an irrevocable and final sentence. He has been sentenced to ten years consecutive to that. That's a final and irrevocable sentence. But on the other count, his sentence is open. And I'm sure that Mr.Jones hopes that by the testimony he gave yesterday that the judge, who controls his final sentence, will give him some consideration for coming in here and telling the truth. Anything wrong with that?

Is there anything wrong with the judge or a district attorney making a recommendation that would say that at least on the third count of these three counts a man who comes in and tells the truth should get somewhat better treatment than a man who refuses to tell the truth? Nothing sinister about that--unless, unless in an effort to improve their own positions Jones and Jenkins (the codefendants) came in here and told something different, changed their stories to come in here and make some deal. Now, I would agree with Mr. Daniel. So you have to ask yourself the question: Did Jones and Jenkins change their stories and come in here and make accusations against this poor man to make themselves a deal?

(T. 356-357). (Emphasis added).

Upon review of this comment, the Supreme Court of Georgia held that the Petitioner failed to interpose a timely objection to this argument and therefore, the Supreme Court of Georgia had nothing to review. Mincey v. State, 251 Ga. 255, ___ S.E.2d ___ (1983). The Supreme Court of Georgia specifically did not address nor decide the Petitioner's claim on anything other than this adequate and independent non-federal ground. With this in mind, Respondent notes that this Court has consistently adhered to the self-imposed principle that it will not review a state court judgment based upon an adequate and independent non-federal or state ground, even though a federal question may be involved and perhaps wrongly decided. Berea College v. Kentucky, 211 U.S. 45, 53 (1908). Fox Film Corp. v. Muller, 296 U.S. 207 (1935). In explanation of this policy, this Court has said:

> The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state courts after we corrected its views of federal laws, our review would amount to nothing more than an advisory opinion.

Herb v. Pitcairn, 324 U.S. 117, 125-126 (1945); Zacchini v. Scripps-Howard Broadcasting Company, 433 U.S. 562, 566 (1977).

It is the Respondent's contention that there exists no federal question for review by this Court. An examination of the foregoing authorities, and the decision rendered by the Supreme Court of Georgia, readily reveals that the decision sought to be reviewed on this instant application for a writ of certiorari is clearly and adequately grounded upon state procedure and law, as opposed to federal law. Accordingly, there exists no federal question for review and this instant application for a writ of certiorari should be denied.

B. THIS COURT SHOULD REFUSE TO GRANT THE REQUESTED WRIT OF CERTIORARI BECAUSE THIS COURT HAS REPEATEDLY AND CONSISTENTLY UPHELD THE CONSTITUTIONALITY OF THE GEORGIA CAPITAL PUNISHMENT STATUTE.

Petitioner contends that his Eighth and Fourteenth Amendment rights were violated by the trial court's handling of a number of the Petitioner's pretrial motions concerning the death penalty. Respondent submits that the trial court acted within the constitutional guidelines established by this Court, and that the Georgia capital punishment statute has been repeatedly and consistently held constitutional by this Court.

Petitioner challenges the death-qualification of jurors during voir dire, claiming that jurors so qualified are "conviction prone." Petitioner contends that the trial court should have ordered an evidentiary hearing with regard to this contention. However, in its review of this contention, the Supreme Court of Georgia examined this Court's decision in Witherspoon v. Illinois, 391 U.S. 510 (1968), as well as the decisions of Smith v. Balkcom, 660 F.2d 573 (5th Cir. 1981) and Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), and determined that there is no federal legal or constitutional requirement to hold an evidentiary hearing to determine whether a death-qualified jury is more prone to convict. Additionally, the Supreme Court of Georgia agreed with the United States Court of Appeals for the Fifth Circuit, which held in the cases cited above, that even assuming that a death-qualified jury is

more likely to convict that a non-death-qualified jury, the practice of excluding for cause those potential jurors so unequivocally opposed to the death penalty that they would automatically vote against it, no matter what the evidence might reveal, does not deny a defendant his constitutional right to an impartial jury.

Petitioner also challenges the constitutionality of the imposition of any death penalty, as well as specifically challenging the constitutionality of the Georgia capital punishment statute. This Court has most recently upheld the imposition of capital punishment, as well as the constitutionality of the Georgia capital punishment statute, in Zant v. Stephens, ___ U.S. ___, 103 S.Ct. 2733 (1983). The Supreme Court of Georgia relied upon this Court's decision in Stephens in rejecting Petitioner's challenges to the capital punishment statute.

Petitioner also claims that it is unconstitutional that the Petitioner received the death penalty while his codefendants received life sentences. In reviewing this allegation, the Supreme Court of Georgia examined this Court's decision in Enmund v. Florida, ___ U.S. ___, 102 S.Ct. 3368 (1982) and found that the decision does not mandate that codefendants receive identical sentences.

The heart of this Court's holding in Enmund is that a person who did not himself kill, attempt to kill, or contemplate that life would be taken, but did aid and abet in the commission of a felony wherein a murder was committed, should not be subject to the death penalty. The logic of this holding is that only those persons who intended to and actually do commit murder should be subject to the death penalty. As evidence presented at trial showed that Petitioner intended to and actually did commit murder, the Supreme Court of Georgia correctly interpreted this Court's holding in Enmund and found that Petitioner was properly subject to the death penalty.

For all of the above and foregoing reasons, Respondent submits that the Supreme Court of Georgia was correct in its interpretation of the Petitioner's constitutional rights and Petitioner's allegations do not present any issue for review by this Court.

C. THIS COURT SHOULD REFUSE TO GRANT THE REQUESTED WRIT OF CERTIORARI BECAUSE THERE IS NO FEDERAL LEGAL OR CONSTITUTIONAL REQUIREMENT THAT PETITIONER BE PROVIDED WITH FUNDS FOR AN INVESTIGATION SOLELY BECAUSE THE STATE HAD HIRED AN INVESTIGATOR.

Petitioner contends that, because the state hired an investigator, it is a violation of the Petitioner's Sixth and Fourteenth Amendment rights to have been denied funds for investigator. Respondent submits that the Supreme Court of Georgia, basing its decision solely upon state law and a finding that the trial court had not abused its discretion, was correct in finding that there was no merit to this allegation as raised by the Petitioner.

Respondent again asserts that the Supreme Court of Georgia addressed this issue solely upon adequate and independent non-federal grounds. As set forth above in Section A of this brief, Respondent notes that this Court has consistently adhered to the self-imposed principle that it will not review a state court judgment based upon an adequate and independent non-federal or state ground, even though a federal question may be involved and perhaps wrongly decided Berea College v. Kentucky, 211 U.S. 45, 53 (1908). Fox Film Corp. v. Muller, 296 U.S. 207 (1935). Accordingly, there exists no federal question for review and this instant application for a writ of certiorari should be denied.

CONCLUSION

This Court should refuse to grant a writ of certiorari to the Supreme Court of Georgia, as it is manifest that either there exists no federal question for review by this Court as to Petitioner's claims of prosecutorial misconduct and an unconstitutional denial of funds for an investigator, and there

is no substantial federal question not previously decided by this Court and the decision sought to be reviewed is demonstrably in accord with the applicable decisions of this Court.

Respectfully submitted,

WILLIAM B. HILL, JR.
Counsel of Record for
Respondent

MICHAEL J. BOWERS
Attorney General

JAMES P. GOOGE, JR.
Executive Assistant Attorney General

MARION O. GORDON
First Assistant Attorney General

DENNIS R. DUNN
Attorney

Please serve:

WILLIAM B. HILL, JR.
132 State Judicial Building
40 Capitol Square, S. W.
Atlanta, Georgia 30334
(404) 656-3359

CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the within and foregoing brief in opposition, prior to filing the same, by depositing a copy thereof, postage prepaid, in the United States Mail, properly addressed upon:

Michael R. Hauptman, Esq.
Suite 1613
57 Forsyth Street, N.W.
Atlanta, Georgia 30303

Honorable Willis B. Sparks
District Attorney
Macon Judicial Circuit
Grand Building
618 Mulberry Street
Macon, Georgia 31201

This 17th day of October, 1983.

WILLIAM B. HILL, JR.